Supreme Court, U.S.
FILED
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CLERK

85-1153

No.....

In The
Supreme Court of the United States
October Term, 1985

—o—

KEARNEY & TRECKER CORPORATION
Petitioner,

v.

PHUC HUU NGUYEN and THU NGUYEN
Respondents.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

—o—

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QUESTIONS PRESENTED

1. Whether there is a denial of equal protection when the substantive law of a state is applied to a party in a way which is diametrically opposite to all parties preceding and following that particular application, and in an Order that mandated that the decision have no precedential value.

2. Whether the substantive law of a state creates a due process property right the non-application of which, without cause, deprives a party of a property right without due process of law.

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No. .....

In The
Supreme Court of the United States
October Term, 1985

KEARNEY & TRECKER CORPORATION,
*Petitioner,**

v.

PHUC HUU NGUYEN and THU NGUYEN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

Kearney & Trecker Corporation petitions for Writ of Certiorari to review the judgment of the Supreme Court of the State of Wisconsin.

OPINIONS BELOW

The Supreme Court of Wisconsin denied petitioner's Petition for Review of an adverse decision of the Court

*Kearney & Trecker Corporation is a wholly-owned subsidiary of Cross & Trecker Corporation.

of Appeals of Wisconsin, District I, without opinion. (App. A, *infra*, App. 1). The opinion of the Court of Appeals of Wisconsin, District I, is unpublished (App. B, *infra*, App. 2-23), and the judgment of the trial court (App. C, *infra*, App. 24-25) is not reported.

JURISDICTION

The Supreme Court of Wisconsin's denial of the Petition for review was entered on October 8, 1985 (App. A, *infra*, App. 1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in relevant part:

> * * * No state shall make or enforce any law which shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Rule 809.23, Wisconsin Rules of Appellate Procedure, is reproduced in Appendix D.

STATEMENT

This case arose out of personal injuries sustained by the Respondent, Phuc Huu Nguyen, in the course of his

employment by Allis-Chalmers (hereinafter "A-C") at its tractor plant in West Allis, Wisconsin. The complaint sought recovery against Petitioner, Kearney & Trecker Corporation (hereinafter "KT"), American Chain and Cable, a division of ACCO, Inc. (hereinafter "ACCO"), and ACCO's insurance carrier, American Mutual Insurance Company. A-C was joined as the employer under the Wisconsin Workmen's Compensation laws.

The complaint alleged negligence by KT in the design, sale, marketing and distribution of a moduline machining center, and alleged negligence by ACCO, subcontractor of KT, for the design, manufacture and installation of the pallet transporters (hereinafter "carts") which conveyed unmachined parts to the machining center. Respondents also alleged a right of recovery against both defendants under strict liability, and sought punitive damages from both defendants.

Respondent's injuries were allegedly caused by this manufacturing system; the system was designed, installed and modified over a period of several years through the combined efforts of KT, ACCO and A-C. The system consisted of three major components: Machining centers (for cutting metal parts) at various work stations, a material transport system, and a computer control system. The computer control system would direct the carts of the material transport system to carry parts or pallets to shuttles, and then direct the shuttles to transfer the parts to machine tables of the machining centers where the work was to be performed on the parts. They would then direct the part off the work table, back to the shuttle, and then either to the next machine or to the inspection station at the end and outside the system.

KT and A-C had initiated discussions concerning the design of a manufacturing system in 1970, and jointly selected ACCO to design, manufacture and install the material handling system, which consisted of carts, which were pulled by an under-the-floor towline. KT designed, manufactured and installed the machining centers, and computer control system. There was close cooperation between ACCO and KT to place the systems together in working condition, comply with industrial codes and make it reasonably safe for personnel.

In October, 1975, ACCO, at A-C's request, gave A-C a quotation for four to five redesigned carts which would have an automatic tow pin designed to alleviate damage from carts colliding. On November 5, 1975, there was a meeting at ACCO's offices attended by KT and A-C at which A-C discussed problems it was having with the material transport system and carts. Mr. Kort, an employee of ACCO, and co-inventor of the ACCO eletctronic safety bumper, conducted the meeting. There were discussions concerning safety bumpers for the carts, and ACCO told A-C and KT that it was in the process of working on some engineering concepts for a "personnel radio control bumper".

On November 13, 1975, KT forwarded a proposal by ACCO to A-C for redesigning and rebuilding A-C's carts. The cost was to be shared equally by A-C and ACCO. The ACCO proposal did not include any reference to electronic safety bumpers; further, ACCO never contacted A-C to recommend that the A-C carts be supplied with the electronic bumpers.

In 1976, A-C purchased five additional carts from a Milwaukee manufacturer, Badger Beau. These carts possessed the same design as those originally manufactured by ACCO. Badger Beau was told to duplicate the original carts; there was no provision for any safety device on the cart, nor did they include any of the modifications which had been discussed in the November 5, 1975, meeting at ACCO. Plaintiff was injured while standing in the path of a cart; specifically, a cart caught him between the shuttle and the cart, pinched his leg and pushed him onto the floor. There was no evidence as to whether the plaintiff was injured by an ACCO or Badger Beau cart.

Because of the complexity of the potential liability issues involved in the case, KT filed a motion for a pre-trial conference and order seeking, *inter alia*, "Definition and simplification of the issues of fact and law." A conference was held, but the court did not hear the issues of the motion, nor was a pre-trial order entered on the matters presented by the motion.

On October 3, 1983, the first day of trial, ACCO and plaintiffs executed a Settlement Agreement known in Wisconsin as a "Pierringer Agreement". Under a substantial body of Wisconsin precedent, Pierringer Agreements limit the amount of damages recoverable to the amount specified in the Agreement; however, the jury is still required to apportion negligence among all defendants.

The trial court, nonetheless, omitted any and all reference to ACCO from the jury instructions pertaining to negligence, manufacturer's duty to warn, and punitive damages. KT was expressly mentioned several times.

Further, ACCO was not mentioned in the special verdict form pertaining to punitive damages; KT was.

The jury returned a verdict on Monday, October 17, 1983, with multiple dissenting jurors. The court refused to accept the verdict and sent the jury back to change the verdict requiring ten jurors to agree. The jury forthwith amended its verdict, finding KT negligent seventy percent (70%), ACCO zero percent (0%), A-C twenty percent (20%) and the plaintiff ten percent (10%); compensatory damages of $535,882.94 and punitive damages against KT only in the amount of $90,000.00. Motions for judgment notwithstanding the verdict and for a new trial were overruled. The judgment was entered on January 25, 1984 and Notice of Appeal filed February 16, 1984. Thereafter, A-C filed a motion to dismiss the appeal as to A-C, and this motion was sustained.

On appeal to the District 1 Court of Appeals, KT argued that the trial court erred in failing to include ACCO in its duty to warn, negligence, and punitive damages instructions; KT asserted that the proper requests and objections had been made and, if not, the failure to include ACCO in these instructions constituted plain error. The Court of Appeals avoided KT's arguments through an unprecedented interpretation of Wisconsin's law governing Pierringer Agreements; specifically, the court ruled that: "ACCO could not have been liable for punitive damages, however, because it had entered into a *Pierringer* release with the Nguyens and was no longer liable for damages." (App. 16). Following this reasoning, the Court of Appeals failed to address the exclusion of ACCO from the "duty to warn" instruction (App. 17-18), and affirmed

the trial court's decision in all particulars on August 15, 1985. The decision was "not recommended for publication in the official reports." (App. 23).

KT filed a Petition for Review of the Court of Appeals' ruling on September 16, 1985, with the Supreme Court of the State of Wisconsin; several issues were appealed, among which was the Court of Appeals' interpretation of Wisconsin law governing Pierringer Agreements. The Supreme Court denied KT's Petition for Review on October 8, 1985; in the words of the Court, "IT IS ORDERED, that the opinion in each of the above-entitled appeals not be published in the official reports."

The due process and equal protection questions raised herein arose out of the Wisconsin Court of Appeals' unexpected reversal of state law for one case only, without publication of its opinion as required by Wisconsin Rule 809.23, and the Wisconsin Supreme Court's refusal to review this unexpected reversal as applied solely to KT, without opinion.[1]

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REASONS FOR GRANTING WRIT

I. Wisconsin Case Law Based On The Pierringer Decision Has Mandated That The Liability Of Released Parties Be Apportioned; In An Opinion Ordered To Be Of No Precedential Value, The Wisconsin Supreme Court Has Carved Out A Solitary Exception To This Law.

[1]This likewise is in contravention of Wisconsin Rule 809.23.

Rule 809.23(3), Wisconsin Rules of Appellate Procedure, mandates that an unpublished decision has no precedential value:

> An unpublished opinion is of no precedential value and for this reason may not be cited in any court of this state as precedent or authority, except to support a claim of res judicata, collateral estoppel or law of the case.

In the 1978 Judicial Council Committee's Note, the Committee provided four reasons why unpublished opinions should not be cited; one reason is that "an unpublished opinion is not new authority, but only a repeated application of a settled rule of law for which there is ample published authority." (App. 26).

The recommendation by the court of appeals and the order by the Wisconsin Supreme Court not to publish the *Nguyen* decision violates this stated reason in this case only. The landmark case *Pierringer v. Hoger*, 21 Wis.2d 182, 124 N.W.2d 106 (1963) makes it clear that notwithstanding the absolving of liability, the released party remains in the suit for purposes of apportioning liability:

> [T]he failure to include in the apportionment question the causal negligence of the settling respondents would, because of the releases, necessarily be prejudicial to the non-settling appellant. Under § 270.27 Stats., which requires a special verdict on all material issues, both the plaintiff and defendant are entitled to have the percentage of the non-settling tortfeasor's negligence determined.

Id. at 112. According to the decisions following *Pierringer*, but preceding the *Nguyen* decision, the omission of a released party from the apportionment question constitutes prejudicial error:

> Even as to those parties who had been dismissed [following their release], the plaintiff had no right to have them removed from that portion of the verdict which apportioned the negligence. Their inclusion in the special verdict was not error; and the deletion of [the released parties] would have been prejudicial [to the non-released parties].

Payne v. Bilco, 54 Wis.2d 345, 195 N.W.2d 641, 645 (1972). The *Pierringer* decision has been invoked as authority in Wisconsin, both before[2] and after[3] the Nguyen trial.

In terms that are clear and unequivocal, the Wisconsin appellate court held that ACCO need not be included in the post manufacture duty to follow instruction, in all instructions pertaining to negligence, and in the interrogatory pertaining to punitive damages on the special verdict form. As to punitive damages, the appellate court had a simple response: "ACCO could not have been liable for punitive damages, however, because it had entered into a *Pierringer* release with the Nguyens and was no longer liable for damages." (App. 16). By affirming the lower

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[2]*See, Connar v. West Shore Equipment of Milwaukee*, 227 N.W.2d 660 (Wis. 1975); *Wagner v. Daye*, 227 N.W.2d 888 (Wis. 1975); *Heldt v. Nicholsen Manufacturing Corp.*, 72 Wis.2d 110, 240 N.W.2d 154 (1976); *Gustavson v. O'Brien*, 87 Wis.2d 193, 274 N.W.2d 627 (1979); *Wussow v. Commercial Mechanisms, Inc.*, 97 Wis.2d 136, 293 N.W.2d 897 (1980); *Johnson v. Misericordia Community Hospital*, 99 Wis.2d 708, 301 N.W.2d 156 (1981); *Young v. Verson Allsteel Press Co.*, 524 F.Supp. 1147 (E.D. Penn. 1981). *See also, Lines v. Ryan*, 272 N.W.2d 896 (Minn. 1978), where the court, in interpreting the legal effect of a *Pierringer* release on the apportionment of liability issue, indicated that the released party must also be identified in the instructions.

[3]*See, Gross v. Lloyds of London*, 121 Wis.2d 78, 358 N.W.2d 266 (1984); *Delmore v. American Family Mut. Ins. Co.*, 118 Wis. 2d 510, 348 N.W.2d 151 (1984); *Teigen v. Telco of Wis., Inc.*, 124 Wis.2d 1, 367 N.W.2d 806 (1985).

court, the Wisconsin Supreme Court upheld this exception to the long history of unbroken precedents requiring the apportionment of damages among released and unreleased parties alike. Accordingly, Kearney & Trecker was subjected to a change in the law which, according to the Wisconsin law, could only happen if the decision was published. However, the fundamental change in the Pierringer doctrine as applied to KT appears to be a change in the law unique to KT: in three published opinions following the KT trial, the *Pierringer* doctrine resurfaces with no apparent changes.[4] The arbitrary exception of the law as applied to KT cannot withstand constitutional muster. Accordingly, KT seeks redress for its unequal treatment before the Wisconsin judiciary from the Nation's Court of last appeal; otherwise, the adverse verdict will be lost in the annals of unpublished decisions.[5]

II. The Decisions Below Deprived KT Of Its Property Without Due Process Of Law By Precluding The Jury From Apportioning Negligence Among All Defendants Under An Unforeseeable and Unique Judicial Construction Of State Law.

Since the comparative negligence scheme in Wisconsin requires the jury to determine both the fact and the amount of liability in cases involving co-defendants, the

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[4]See Note 3.

[5]A recent editorial by Ernest Conine laments the "economic illiteracy" of juries and the recent efforts of Congress "to bring order out of chaos" in order to stem unreasonably large jury verdicts; efforts to educate these same juries are impossible if a judiciary is able to hide behind unpublished decisions. Conine, *Trying to Prune the Liability-Award Money Tree*, Omaha World-Herald, November 27, 1985, at 10, Col. 4; App. E.

state may not, consistent with due process, deprive a party of the right to have this substantive law applied in its case. *Bell v. Burson*, 402 U.S. 535, 541. The trial below deprived KT of the requisite apportionment of liability, and thereby denied KT a meaningful proceeding appropriate to the nature of the case. *Id.* at 542, citing *Armstrong v. Manzo*, 380 U.S. 545, 552 ("meaningful" process required), and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (process must be "appropriate to the nature of the case").

This Court has recognized that state-created rights constitute a property interest; the *Pierringer* doctrine gave KT the right to have ACCO's liability apportioned barring a change in the law. Given the fact that the law of Wisconsin regarding *Pierringer* has not changed or been overruled, KT has been deprived of its right to have the substantive law of Wisconsin applied to it.

KT does not dispute a state court's right to overrule principles and doctrines established by prior decision; the blunt fact in the instant case is that because the *Nguyen* decision went unpublished, and because cases have cited *Pierringer* as controlling subsequent to the *Nguyen* decision, *Pierringer* has not been overruled. Therefore, the *Pierringer* doctrine has createed a substantive right for all Wisconsin litigants which must be applied in cases involving released parties. Failure to do so here has deprived KT of this substantive right by denying KT a meaningful procedure appropriate to the case. *See Armstrong* and *Mullane, supra; see also Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 681-682.

CONCLUSION

The Wisconsin judiciary has rendered a decision which subverts two of the most fundamental principles of the American form of government. The mandate that the decision remain unpublished has insured that the practicing bar, the public at large, and the Wisconsin Legislature shall remain uninformed of the unconstitutional treatment suffered by Kearney & Trecker. Kearney & Trecker's right to the guarantees of the American Constitution is just as fundamental as they are to any individual who has suffered undue discrimination at the hands of a court or judicial system; accordingly, Kearney & Trecker, and each individual who form a part of the Kearney & Trecker Corporation, ask this Court to redress the injustice it has suffered. In the interest of the general welfare of all, the secreting of the opinion under the facts of this case by ordering it not to be published is the unconstitutional vehicle by which an unconstitutional result is accomplished.

Respectfully submitted,

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APPENDIX A

(SEAL)

Office of the Clerk

SUPREME COURT
STATE OF WISCONSIN

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Madison, October 8, 1985

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The Court today announced an order in your case as follows:

No. 84-389 *Phuc Huu Nguyen and Thu Nguyen v. Kearney & Trecker Corporation, et al.*

The court having considered defendant-appellant-petitioner Kearney & Trecker Corporation's petition for review of an adverse decision of the court of appeals, district I, dated August 15, 1985,

IT IS ORDERED the petition for review is denied, with $50 costs to plaintiffs-respondents.

MARILYN L. GRAVES
Clerk of Supreme Court.

APPENDIX B

COURT OF APPEALS DECISION
DATED AND RELEASED

August 15, 1985

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 20 days hereof, pursuant to Rule (Illegible) (1).

NOTICE

This opinion is subject to further editing. If published the official version will appear in the bound volume of The Official Reports.

No. 84-389

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

PHUC HUU NGUYEN and THU NGUYEN,

Plaintiffs-Respondents,

v.

KEARNEY & TRECKER CORPORATION,
a Wisconsin coporation,

Defendant-Appellant,

AMERICAN CHAIN AND CABLE, Division of ACCO, Inc., a foreign corporation; AMERICAN MUTUAL INSURANCE COMPANY of BOSTON, a foreign corporation; and ALLIS-CHALMERS CORPORATION, a Wisconsin corporation,

Defendants.

APPEAL from a judgment of the circuit court for Milwaukee county: THOMAS P. DOHERTY, Judge *Affirmed.*

Before Wedemeyer, P.J., Moser and Sullivan, JJ.

SULLIVAN, J. Kearney & Trecker Corporation (Kearney & Trecker) appeals from a judgment awarding $535,882.94 in compensatory damages and $90,000 in punitive damages to Phuc Huu Nguyen and Thu Nguyen for injuries suffered by Phuc Huu Nguyen (Nguyen) in the course of his employment with Allis-Chalmers Corporation (Allis-Chalmers). The machining system in operation at the Allis-Chalmers plant was designed by Kearney & Trecker. Nguyen's right leg and left foot were injured when he was trapped between a moving cart and a shuttle.

Kearney & Trecker raises numerous issues for our review that can be grouped generally into five categories: (1) disputed evidentiary rulings; (2) denial of its motion for a mistrial; (3) disputed jury instructions; (4) jury reinstruction on the five-sixths rule after the return of a verdict; and (5) the denial of its motion to join certain parties defendant. We hold that (1) the trial court did not abuse its discretion in excluding or admitting the evidence in controversy; (2) the trial court did not abuse its discretion in denying the motion for mistrial; (3) the trial court did not abuse its discretion in instructing the jury; (4) the trial court did not err in reinstructing the jury on the five-sixths rule; and (5) any error in refusing to join certain parties defendant was harmless.

Nguyen was employed as an inspector at Allis-Chalmers' tractor plant in West Allis. His job was to inspect parts for defects at certain points in a "flexible machining system," or FMS. The FMS consisted of three components: machining centers, a "material handling system" (MHS), and an automated computer control system.

Allis-Chalmers contracted with Kearney & Trecker in the early 1970's to design and install the FMS. Kearney & Trecker subcontracted with American Chain and Cable (ACCO) to design and install the MHS. As originally designed by Kearney & Trecker, materials were transported from machining center to machining center by the MHS, which consisted of carts moving along a cable under the floor. At each machining center, a stationary shuttle moved the material from a cart onto a work table and, after processing, back onto a cart. The FMS was designed to be fully automated; there was no need for people to be anywhere within the system. Product inspections were done only at the end, and outside, of the FMS.

If people needed to enter, the system could be shut down manually. Carts could also be stopped by pulling a tow pin. Because people were not supposed to be inside the system while it was operating, however, guards were not provided at pinch points and shear points within the system. (Pinch points and shear points are places where two parts come together such that a person, if caught between them, could be hurt.)

With inspections taking place only at the end of the FMS, Allis-Chalmers found that an unacceptable number of defective parts needed reworking. To detect faults early and to correct them, Allis-Chalmers had the FMS reprogrammed in the late 1970's to allow inspections at eleven stations within the system.

Nguyen was injured when his legs were trapped between an off-shuttle and a moving cart. He had been inspecting a part inside the FMS at an off-shuttle, which was not at one of the eleven inspection stations. Accord-

ing to the testimony of other Allis-Chalmers workers, inspections were routinely done at this off-shuttle point.

Kearney & Trecker and ACCO sold and installed a similar FMS at a plant operated by the Avco Company. In 1976, three years before Nguyen's accident, an Avco worker was injured when he became trapped between a shuttle and a moving cart while performing maintenance on the system. Shortly thereafter, Kearney & Trecker requested and received from ACCO a quote for retrofitting the MHS with safety bumpers of ACCO's design. Neither the Avco accident nor the cost of the safety bumpers was communicated to Allis-Chalmers prior to Nguyen's accident.

Nguyen brought suit against Kearney & Trecker, ACCO, and ACCO's insurer to recover for his injuries. Allis-Chalmers was joined as the employer solely for apportionment of negligence. Nguyen's wife sued for loss of her husband's society, services, and consortium. On the first day of trial ACCO settled out, entering into a *Pierringer* agreement with the Nguyens. Trial proceeded and the jury ultimately returned a verdict awarding the Nguyens compensatory and punitive damages. The jury found that there was no strict product liability, and that Kearney & Trecker was 70% negligent, Allis-Chalmers was 20% negligent, ACCO was 0% negligent, and Nguyen was 10% negligent. Kearney & Trecker alleges numerous errors in this appeal.

1. EVIDENTIARY RULINGS

Kearney & Trecker first asserts prejudicial error by the trial court's admission or exclusion of certain pieces of evidence. Specifically, Kearney & Trecker challenges

the exclusion of parts of Nguyen's deposition, parts of the deposition of Werner Kort, an employee of ACCO, and part of a surveillance videotape that Kearney & Trecker had made of Nguyen. Kearney & Trecker also challenges the trial court's admission of Nguyen's job search list and evidence of a prior accident at an unrelated company.

A trial court's decision to admit or exclude evidence is a discretionary one. *State v. Wollman*, 86 Wis. 2d 459, 464, 273 N.W.2d 225, 228 (1979). Even relevant evidence may be excluded if the trial court decides, in its discretion, that the probative value of the proffered evidence is outweighed by the possibility of unfair prejudice or other factors that might impede the orderly and expeditious disposition of issues at trial. *Id.*; sec. 904.03, Stats. Because of the discretionary nature of the trial court's determination, it will not be disturbed on appeal if it has any reasonable basis. *Colby v. Colby*, 102 Wis. 2d 198, 207, 306 N.W.2d 57, 62 (1981). In the case at bar, the trial court did not abuse its discretion in ruling on any of the challenged evidence.

A. Exclusion of the Depositions.

In its case-in-chief, Kearney & Trecker read into evidence parts of the deposition of Werner Kort, an engineer employed by ACCO. ACCO was a party to the action when Nguyen took Kort's deposition. Allis-Chalmers was notified of the deposition but did not attend. Kort had been listed by ACCO, but not by Kearney & Trecker, as a possible expert witness.

Allis-Chalmers objected only to those portions of Kort's deposition that presented Kort's expert opinion, on

the ground that Kearney & Trecker had not named Kort as an expert witness prior to trial. Allis-Chalmers stipulated to Kort's qualifications as an expert on conveyor systems and their safety, but asserted that Allis-Chalmers would be prejudiced by its inability to cross-examine Kort regarding his opinions. The passages at issue concerned Kort's opinion that the safety bumper system was not completely effective as a personal safety device.

The court excluded the passages at issue on the basis of Allis-Chalmers' objection and because the evidence was cumulative. John Hughes, a Kearney & Trecker employee, had already testified to the inadequacy of safety bumpers.

Kearney & Trecker next attempted to introduce several passages from Nguyen's deposition. Kearney & Trecker had used this deposition in its cross-examination of Nguyen earlier in the trial. Counsel for Kearney & Trecker offered the particular passage "for purposes of impeachment of the plaintiff and with respect to the issues of damages, impeachment on the issues of damages." After reviewing all of the passages in question, the trial court refused to allow them to be read to the jury. The court held that the offered passages were cumulative and were not "impeaching in their nature." Moreover, the trial court stated that admission of the deposition passages would be improper at that time in light of the delay involved in having Nguyen's interpreter return to court.

Generally, the deposition of a party is admissible for any purpose by an adverse party. Sec. 804.07(1)(b), Stats. Section 804.07(1)(b) does not, however, grant to an adverse party an absolute right to present the deposition

testimony of other parties. Rather, the trial court may exercise its discretion in excluding evidence that is cumulative or that would necessitate undue delay. Sec. 904.03, Stats; *State v. Lenarchick*, 74 Wis. 2d 425, 448, 247 N.W.2d 80, 93 (1976) (affirming trial court's exclusion of cumulative impeachment testimony). The trial court's discretion to admit or exclude evidence also extends to expert opinions. They, too, may be excluded if cumulative. *Fantin v. Mahnke*, 113 Wis. 2d 92, 95-96, 334 N.W.2d 564, 566-67 (Ct. App. 1983).

In the case at bar, the trial court heard arguments of counsel and examined the passages at issue before ruling on their admissibility. Based on the record, the trial court was reasonable in finding that the deposition passages were cumulative and thus inadmissible. The trial court, therefore, did not abuse its discretion in excluding portions of the depositions of Nguyen and ACCO's engineer.

B. Exclusion of the Surveillance Video.

Kearney & Trecker offered into evidence a videotape of Nguyen made from surveillance firms taken by a private investigator. The court admitted the summer and spring scenes but excluded the winter scenes because the speed seemed distorted. The trial court did not abuse its discretion in excluding the winter scenes.

Videotaped evidence may be presented at trial. Sec. 885.42(2), Stats. A videotape recording is subject to the same rules of admissibility as is photographic evidence in general. C. Scott, *Photographic Evidence* § 1294 (2d ed. Supp.); *see also* sec. 910.01(2), Stats. ("photograph" as used in rules of evidence includes "motion picture").

The legal principles governing admission of photographs in evidence were well established in this state's common law before the adoption of the rules of evidence. This court has viewed the application of these principles as essentially unchanged following the adoption of the rules. The admission of photographs in evidence is a matter within the trial court's discretion. *Simpson v. State*, 83 Wis. 2d 494, 505, 266 N.W.2d 270, 274 (1978). Photographic evidence should be admitted if it will help the jury gain a better understanding of material facts; it should be excluded if it is not "substantially necessary" to show material facts and will tend to create sympathy or indignation or divert the jury's attention to improper considerations. *Neuenfeldt v. State*, 29 Wis. 2d 20, 33, 138 N.W.2d 252, 259 (1965), *cert. denied*, 384 U.S. 1025 (1966). In *Hayzes v. State*, 64 Wis. 2d 189, 218 N.W.2d 717 (1974), the court described the standard of appellate review of a trial court's discretion to admit phtographs as follows:

> While reasonable persons looking at the photographs as a part of a record may have differing opinions in regard to whether they were cumulative, inflammatory, or prejudicial, the judgment is essentially one to be exercised by the trial judge. He, better than anyone else, in light of the evidence, can make the determination that the photographs will assist the jury in a rational and dispassionate determination of the facts. Where a trial judge has applied the appropriate discretionary standards, this court will not reverse his decision unless it appears that, in light of the record as a whole, his conclusion was wholly unreasonable or if the circumstances indicate that the only purpose of the photographs was to inflame or prejudice the jury.

Id. at 200, 218 N.W.2d at 723.

The trial court concluded, after viewing the entire videotape, that the winter scenes appeared unnaturally

speeded up. For that reason, and because the spring and summer scenes adequately represented Nguyen's ability to move, the trial court allowed only the spring and summer scenes to be shown to the jury. The record establishes a reasonable basis for the trial court's decision and, therefore, it will not be disturbed.

C. Admission of Nguyen's Job Search List.

On direct examination, Nguyen identified a list of places at which he applied for work. Kearney & Trecker objected that the list was inadmissible because it was not relevant. The trial court admitted the list over Kearney & Trecker's objection, but the jury apparently never saw the list.

On appeal, Kearney & Trecker asserts that the job list should have been excluded on the additional grounds that it misled the jury and that it is hearsay. Because these last two grounds are raised for the first time on appeal, this court need not address them. *Allen v. Allen*, 78 Wis. 2d 263, 270, 254 N.W.2d 244, 248 (1977); *see also Caccitolo v. State*, 69 Wis. 2d 102, 114, 230 N.W.2d 139, 146 (1975) (failure to object to hearsay when it is offered waives issue of its admissibility). We hold that the trial court did not abuse its discretion in finding the evidence relevant.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Section 904.01, Stats; *Onalaska Electrical Heating, Inc. v. Schaller*, 94 Wis. 2d 493, 500, 288 N.W.2d 829, 832 (1980). A trial

court's decision regarding the relevance of evidence will not be disturbed unless the trial court abused its discretion. *Keithley v. Keithley*, 95 Wis. 2d 136, 140, 289 N.W.2d 368, 371 (Ct. App. 1980).

The trial court found that Nguyen's job search list demonstrated that he "has made efforts to seek employment which is significant on the issue, if any there be, as to mitigation of damages and/or as to ability to work." This is a reasonable basis for the trial court's conclusion that the job search list was relevant and, thus, admissible. We hold that there was no abuse of discretion.

D. The Admission of Evidence of a Similar Accident.

Kearney & Trecker next alleges error in the trial court's decision to allow the jury to hear evidence of a prior accident. We hold that the trial court did not abuse its discretion in admitting the evidence.

About three years before Nguyen's injury occurred, an employee of Avco (a company unrelated to this case) was injured when struck from behind by a cart and caught between the cart and a shuttle in an FMS sold by Kearney & Trecker. The FMS's at Avco and Allis-Chalmers both had pinch points at areas where people were not supposed to be. The speed of the carts was the same in both systems, and human error in equipment use was a factor in both accidents. Kearney & Trecker investigated the Avco accident and then requested and received estimates from ACCO on equipping carts at all three FMS locations (Allis-Chalmers, Avco, and another unrelated company) with safety bumpers. Apparently, however, Kearney & Trecker never notified Allis-Chalmers of the Avco accident or the availability of the bumpers.

At trial, Allis-Chalmers and Nguyen sought to introduce evidence of the Avco accident. Kearney & Trecker objected on the grounds of irrelevance, immateriality, and undue prejudice. The record reflects that the trial court heard extensive arguments by counsel, viewed the exhibits, questioned a witness, and reviewed the relevant law before deciding to admit the evidence.

Evidence of prior accidents is admissible in the trial court's discretion. *Callan v. Peters Construction Co.*, 94 Wis. 2d 225, 232, 288 N.W.2d 146, 149 (Ct. App. 1979). In determining whether an abuse of discretion has occurred, this court must consider the purpose for which the evidence was offered and the nature of the negligence claimed. *Netzel v. State Sand & Gravel Co.*, 51 Wis. 2d 1, 10, 186 N.W.2d 258, 263 (1971). No abuse of discretion will be found if the evidence was offered for a valid purpose and if "the nature of the prior act was so probative as to help the jury in its factual determination . . . ." *Callan*, 94 Wis. 2d at 233, 288 N.W.2d at 150.

Allis-Chalmers and Nguyen offered evidence of the Avco accident for the purpose of proving that Kearney & Trecker had notice of the potentially dangerous condition of the FMS. Prior accident evidence is properly admissible to show "that the person responsible knew or should have known of the existence of the defect." *Netzel*, 51 Wis. 2d at 9, 186 N.W.2d at 263. Moreover, whether Kearney & Trecker knew, prior to Nguyen's accident, of the risk of personal injury posed by the FMS and of the availability of equipment to protect against that risk is highly probative on the issues of negligence and strict liability. Evidence of the Avco accident, therefore, could

have been helpful to the jury in its factual determination. Accordingly, the trial court did not abuse its discretion in admitting evidence of the prior accident at Avco.

II. MISTRIAL

Kearney & Trecker next asserts error in the trial court's denial of its motion for a mistrial and its posttrial motion for a new trial on the grounds of juror misconduct. The trial court did not abuse its discretion in denying the motions.

Several days into the trial, an attorney for Kearney & Trecker moved for a mistrial based on his observation of Nguyen apparently talking to a juror in a restroom during recess. The court questioned the juror under oath. The juror flatly denied engaging in any conversation with Nguyen. All parties' attorneys were given an opportunity to question the juror as well, but they declined to do so. The court found as a matter of fact that no conversation had taken place. Accordingly, Kearney & Trecker's motion to declare a mistrial was denied, as was its posttrial motion for a new trial on the same basis.

The denial of a motion for mistrial will be reversed only on a clear showing of an abuse of discretion by the trial court. *Johnson v. State*, 75 Wis. 2d 344, 365, 249 N.W.2d 593, 604 (1977). The trial court must determine, in light of the whole proceeding, whether the claimed error is sufficiently prejudicial to warrant a mistrial. *Oseman v. State*, 32 Wis. 2d 523, 528-29, 145 N.W.2d 766, 770 (1966). As the court noted in *Oseman*, the inquiry "must center primarily around the facts in each case, and the ultimate decision . . . rests in the sound judicial discretion of the court." *Id.* at 528, 145 N.W.2d at 770.

In reviewing the trial court's denial of a mistrial, this court must consider the possibly prejudicial nature of the claimed error and any steps taken by the trial court to mitigate such prejudice. *Johnson*, 75 Wis. 2d at 366, 249 N.W.2d at 604. A reviewing court will uphold the denial of a mistrial unless it can conclude that there is a reasonable probability that the jury may have reached a different result had the claimed error not occurred. *Oseman*, 32 Wis. 2d at 530, 145 N.W.2d at 770.

Communication with a juror is not sufficient by itself to warrant a new trial. Rather, there must be some showing of probable prejudice. *Shelton v. State*, 50 Wis. 2d 43, 51, 183 N.W.2d 87, 92 (1971). Moreover, it is up to the moving party to produce clear and convincing evidence that extraneous prejudicial information was improperly brought to the juror's attention or that any outside influence was improperly brought to bear on any juror. *After Hour Welding, Inc. v. Laniel Management Co.*, 108 Wis. 2d 734, 744, 324 N.W.2d 686, 692 (1982); *see Fantin v. Mahnke*, 113 Wis. 2d 92, 102, 334 N.W.2d 564, 569-70 (Ct. App. 1983) (no abuse of discretion to deny motion for new trial based on juror misconduct, when moving party failed to show that juror's unauthorized view of scene prejudicially affected jury's verdict).

In the case at bar, the trial court stated that it found nothing in the record to support "the utter speculation that, first of all, there was a prejudicial conversation, and secondly, that [the] juror related information from that conversation to the other 12 jurors." The juror in question stated under oath that no conversation at all took place between him and Nguyen, and no other evidence was

presented. As such, Kearney & Trecker did not present clear and convincing evidence of prejudice. Additionally, the trial court relegated the juror in question to the status of alternate. Thus, the juror was not allowed to deliberate with the rest of the jurors.

The trial court had a rational basis for its decision. In light of the steps taken by the trial court to mitigate the effects of any prejudice, and the lack of any evidence of prejudice, we conclude that the trial court did not abuse its discretion in denying Kearney & Trecker's motions for mistrial and a new trial based on juror misconduct.

III. JURY INSTRUCTIONS

Kearney & Trecker alleges error in the trial court's choice of jury instructions. We find no abuse of discretion.

A trial court has broad discretion in instructing the jury. *State v. Higginbotham*, 110 Wis. 2d 393, 403, 329 N.W.2d 250, 255 (Ct. App. 1982). If instructions are challenged on appeal, this court must consider the instructions as a whole. No grounds for reversal exist if the overall meaning communicated by the instructions was a correct statement of the law. *Leahy v. Kenosha Memorial Hospital*, 118 Wis. 2d 441, 451, 348 N.W.2d 607, 613 (Ct. App. 1984). Even if it appears that the law has not been correctly stated, however, reversal is not indicated unless this court is satisfied that a probability, not a mere possibility, exists that the jury was misled. *Id.* at 451-52, 348 N.W.2d at 613.

Kearney & Trecker argues that the trial court erred in giving a punitive damages instruction. This issue is waived by Kearney & Trecker's failure to object on the

record at the instructions conference. The trial court, in going over the instructions that were to be given, stated, "Punitive damages, standard form 2520 I believe is what we agreed on." There were no objections following this statement. Thus, Kearney & Trecker has waived any error. Sec. 805.13(3), Stats; *La Chance v. Thermogas Co.*, 129 Wis. 2d 569, 577, 357 N.W.2d 1, 5 (Ct. App. 1984) (failure to timely object to jury instruction constitutes waiver of objection).

Kearney & Trecker also asserts that ACCO should have been included in the punitive damages instruction and corresponding question on the special verdict. ACCO could not have been liable for punitive damages, however, because it had entered into a *Pierringer* release with the Nguyens and was no longer liable for damages.

Kearney & Trecker next claims that it was prejudicial error for the trial court to refuse to instruct on Allis-Chalmers' higher duty of care under the safe place statute. *See* sec. 101.11, Stats. The trial court explained that the necessary concepts of law were covered adequately in the negligence instructions.

It is not error to refuse to give special instructions if the instructions given adequately cover the applicable law. *Hampton v. State*, 92 Wis. 2d 450, 463, 285 N.W.2d 868, 874-75 (1979). Specifically, a trial court may properly refuse to give a safe place instruction when the jury is instructed on comparative negligence. *Bruss v. Milwaukee Sporting Goods Co.*, 34 Wis. 2d 688, 698-99, 150 N.W.2d 337, 342 (1967). In *Bruss*, students were injured at school on a set of bleachers. In a subsequent products liability action, the jury was instructed to determine causal negligence and to apportion it among the school, the manu-

facturer, and the retailer. On appeal by the retailer, the supreme court upheld the trial court's refusal to give the retailer's proposed instruction on the school's duty under the safe place statute. The *Bruss* court reasoned that, since the jury was instructed regarding negligence and had found the school 10% negligent, it was "of no consequence whether the negligence was under the safe-place statute or common-law negligence." *Id.* at 699, 150 N.W.2d at 342. *See also Lovesee v. Allied Development Corp.*, 45 Wis. 2d 340, 347, 173 N.W.2d 196, 200 (1970) (in action based on safe place statute, no error in trial court's refusal to instruct on employer's higher duty of care when comparative negligence instruction is given).

The record presents a reasoned basis for the trial court's decision to refuse the proposed instruction. Thus, we find no abuse of discretion.

Lastly, Kearney & Trecker asserts that the trial court erroneously instructed the jury that Kearney & Trecker had a postmanufacture duty to warn Allis-Chalmers of potential dangers in the FMS. A review of the record shows that the trial court considered the relevant law and facts and reached a reasonable decision. *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16, 20 (1981). There was no abuse of discretion.

The instruction was based on *Kozlowski v. John E. Smith's Sons Co.*, 87 Wis. 2d 882, 275 N.W.2d 915 (1979). That case held that a jury should consider whether the manufacture-seller of a machine had a duty to notify its customers of the availability of a safety feature and the existence of the hazard it was designed to prevent. *Id.* at 899-900, 275 N.W.2d at 923. Such a duty could be based

on negligence or strict liability, and should be determined according "to the nature of the industry, warnings given, . . . safety improvements, the number of units sold and reasonable marketing practices. . . '" *Id.* at 901, 275 N.W.2d at 924.

Kearney & Trecker argues that *Kozlowski* does not apply to the instant case because Kearney & Trecker did not manufacture the carts and because the jury did not find the FMS to be an unreasonably dangerous defective product. These claims are without merit.

First, Kearney & Trecker sold the entire FMS, including the carts, to Allis-Chalmers. There is nothing in *Kozlowski* that limits a duty to warn solely to manufacturers. Secondly, *Kozlowski* did not impose, as a prerequisite to a duty to warn, any requirement that a product defect be proven. The *Kozlowski* court ordered a new trial on the issues of both defective design and duty to warn. The court did not indicate that a finding on one issue was a condition precedent to consideration of the other issue. *Id.* at 904, 275 N.W.2d at 925. We conclude that the trial court in the instant case properly applied the *Kozlowski* case in its instruction to the jury.

IV. REINSTRUCTION ON 5/6 RULE

Kearney & Trecker asserts that a new trial should be granted because of a coercive reinstruction given by the trial court regarding the five-sixths rule. *See* sec. 805.09(2), Stats. Because it was proper for the trial court to reinstruct the jury and because the language of the reinstruction was not coercive, we hold that the trial court did not abuse its discretion.

In its original instruction to the jury, the trial court explained that "agreement by ten or more jurors is sufficient to form the verdict of the jury. . . . If you can do so consistently with the duty each of you owes as a juror, at least the same ten jurors should concur in all the answers made." There was no objection to this instruction.

The jury returned a verdict in which ten jurors agreed on one question while a different ten agreed on another question. The court informed counsel that the jury would be reinstructed "that the same ten jurors must agree on those questions in order for it to be a verdict that is acceptable." Kearney & Trecker, having already moved for a mistrial, objected to any reinstruction at all, on the ground that "the jurors were initially instructed by the Court at length and . . . it's an error to pursue the matter further at this time." Kearney & Trecker did not object to the court's proposed language.

The court reinstructed the jury as follows:

> [A]ssuming that you have ten jurors that agree on Question 13, then I want you to address your attention to Question 14D. . . . [I]n order for me to have a verdict in final form acceptable by the Court, the same ten jurors must agree. . . . Please understand, I'm not asking or ordering any juror to change their dissent. I'm merely indicating to you that in order for us to have a verdict that is final [sic] form that I can accept, I have to have that combination of the same ten jurors agreeing their answers to Question 13 and the answer to Question 14D.

After their reinstruction, the jury returned a verdict in which one juror had withdrawn his dissent to question 14D. The trial court accepted the verdict.

Kearney & Trecker appeals the denial of its motion for a new trial on the ground that the trial court's language in the reinstruction was coercive. Nguyen argues that Kearney & Trecker waived the question of coerciveness by not objecting to the nature of the language at the time the trial court proposed the reinstruction. Rather than decide whether there was waiver, we note only that even a waived error in jury instructions is reviewable if a party's substantial rights are affected. *State v. Paulson*, 106 Wis. 2d 96, 104-05, 315 N.W.2d 350, 354 (1982). Kearney & Trecker's right to a jury verdict that is free of coercion certainly falls within this rule.

Although a trial court has broad discretion regarding the language used to instruct a jury, *La Chance*, 120 Wis. 2d at 577, 357 N.W.2d at 5, a misapplication of law is an abuse of that discretion. *State v. Hutnik*, 39 Wis. 2d 754, 763, 159 N.W.2d 733, 737 (1968). Whether the trial court's reinstruction was coercive is a question of law. Thus, we need not defer to the trial court's decision. *First National Leasing Corp. v. City of Madison*, 81 Wis. 2d 205, 208, 260 N.W.2d 251, 253 (1977).

When a jury presents a verdict that is patently inconsistent, the trial court should reinstruct the jury and direct it "again on its duty to produce a verdict that conforms to the court's instructions." *Westfall v. Kottke*, 110 Wis. 2d 86, 96, 328 N.W.2d 481, 487 (1983); *see also Bensend v. Harper*, 2 Wis. 2d 474, 479, 87 N.W.2d 258, 260-61 (1958) (proper reinstruction on five-sixths rule). Regarding the five-sixths rule, it is proper to instruct the jury of its duty to endeavor to arrive at an agreement and that the same ten members should concur in the answers.

It is not proper, however, to instruct the jury "that no other course is permissible." *Guth v. Fisher*, 213 Wis. 323, 331, 251 N.W. 223, 226 (1933). The trial court may not suggest that any juror is obligated to suppress his or her ultimate disagreement. *Kowalke v. Farmers Mutual Automobile Insurance Co.*, 3 Wis. 2d 389, 403, 88 N.W.2d 747, 754 (1958).

Kearney & Trecker asserts that the trial court's use of the phrase, "the same ten jurors must agree," rendered the reinstruction coercive. In support of this contention, Kearney & Trecker cites several cases in which similar language was found on appeal to be coercive. Taken as a whole, however, the reinstruction in the instant case is readily distinguishable. For example, in *Guth v. Fisher*, the jury was told that "[t]he same ten must be in agreement upon all of the answers made." *Guth*, 213 Wis. at 330, 251 N.W. at 226. Unlike the trial court in the instant case, however, the trial court in *Guth* also instructed that "*[i]t is not permitted* that ten agree to one answer and a different ten agree to other answers." *Id.* (emphasis added). On appeal, this language was held "equivalent to instructing the jury that they may not disagree." *Id.*

Similarly, in *Kasper v. Kocher*, 240 Wis. 629, 4 N.W.2d 158 (1942), the jury was told that "[y]ou must go back and . . . continue your deliberations until the same ten agree. . . ." *Id.* at 636, 4 N.W.2d at 161. The jury was reinstructed and sent back twice with this language. The supreme court concluded that the instructions were coercive because "the jurors probably were caused thereby to believe that no other course was permissible. . . ." *Id.* at 637, 4 N.W.2d at 162.

Unlike the trial courts in *Guth* and *Kasper*, the trial court here did not say that the jurors were "not permitted" to disagree or that they had to continue deliberating until they did agree. Rather, the court expressly stated that jurors were not being asked or ordered to change their dissents.

Finally, in *Perkie v. Carolina Insurance Co.*, 241 Wis. 378, 6 N.W.2d 195 (1942), the trial court gave the following instruction, which resulted in a new trial: "Before you can render a good verdict the same ten will have to agree on both [questions]." *Id.* at 383, 6 N.W.2d at 197. Although the language now at issue closely follows that held to be coercive in *Perkie*, the reinstruction in the instant case is saved by the trial court's explanation that jurors were not being told to change their answers.

The trial court did use language that has been disapproved by the supreme court. Nevertheless, the reinstruction as a whole was not coercive. The trial court thus did not abuse its discretion in refusing to grant a new trial on that basis.

V. NONJOINDER

Finally, Kearney & Trecker asserts that it was prejudicial error for the trial court to refuse to join Wells Fargo Bank, N.A. and A.W. Frink as trustee (Wells Fargo). Wells Fargo was the titleholder and lessor of the FMS under a complicated financing scheme. We decline to address the merits of the issue of whether a finance lessor may be held liable for a user's personal injury in a products liability action. Because the jury found that the product in question was not in a defective condition un-

reasonably dangerous to a user, a determination on the issue of the finance lessor's liability cannot have a practical effect on an existing controversy. *See Racine v. J-T Enterprises of America, Inc.*, 64 Wis. 2d 691, 700, 221 N.W.2d 869, 874 (1974).

In *Dippel v. Sciano*, 37 Wis. 2d 443, 459, 155 N.W.2d 55, 63 (1967), this state adopted the concept of strict liability found in Restatement (Second) of Torts § 402A. That section sets out the standard that, for liability to arise, the product must be in a defective condition unreasonably dangerous to the user. *Id.* Therefore, in order for a seller to be strictly liable for physical injury to the user, the user must prove, *inter alia*, that the product was in a defective condition when it left the possession or control of the seller. *Id.* at 460, 155 N.W.2d at 63.

Question 1 of the special verdict was as follows: "Was the Flexible Machining System, as designed and installed at Allis-Chalmers Corporation, in a defective condition unreasonably dangerous to a prospective user?" The jury unanimously answer, "No." Thus, Wells Fargo could not have been found liable even if it had been a proper party. If there was any error in not joining Wells Fargo it was harmless and, therefore, no new trial is warranted. Sec. 805.18, Stats; *Jax v. Jax*, 73 Wis. 2d 572, 582, 243 N.W.2d 831, 837 (1976).

By the Court.—Judgement affirmed.

Not recommended for publication in the official reports.

APPENDIX C

STATE OF WISCONSIN : CIRCUIT COURT :
MILWAUKEE COUNTY

Case No. 532-412

PHUC HUU NGUYEN and
THU NGUYEN,

Plaintiffs,

vs.

KEARNEY & TRECKER CORPORATION, et al,

Defendants.

ORDER FOR JUDGMENT

(Filed January 25, 1984)

The above-entitled action having been tried before this Court, The Honorable Thomas P. Doherty, Circuit Judge presiding, and a jury on the 17th day of October, 1983 finding for plaintiffs, and the plaintiffs appearing by their attorney, Don C. Prachthauser and the defendants appearing by their attorneys, Malcolm D. Young and Louis H. Parent, and the plaintiffs having filed their Motion for Judgment on the Verdict and the defendants having filed their Motions After Verdict, all of which are on file herein, and having been presented to the Court;

It is determined that the plaintiffs are entitled to judgment on the verdict as rendered herein:

NOW, therefore, upon all the files, records and proceedings heretofore had herein,

IT IS HEREBY ORDERED:

1. Plaintiffs' Motion for Judgment on the Verdict is hereby granted.

2. Defendants' Motions After Verdict are hereby denied.

3. The plaintiffs are entitled to recover from the defendant, Kearney & Trecker judgment in the sum of Six Hundred Ninety Seven Thousand Eight Hundred Sixty Eight and 64/100 Dollars ($697,868.64), as being the amount of the compensatory damages as determined by the jury less a deduction of Ten Percent (10%) for the contributory negligence of the plaintiff as determined by the jury, plus punitive damages in the amount of Ninety Thousand Dollars ($90,000.00), plus interest from June 9, 1983, through October 17, 1983, in the amount of Ninety Seven Thousand Six Hundred Seventy Three and 40/100 Dollars ($97,673.40), along with double plaintiffs taxable costs and disbursements, and interest from October 17, 1983, until paid at the legal rate of interest.

Dated this 24th day of January, 1984.

BY THE COURT

/s/ The Honorable Thomas P. Doherty
Milwaukee County Circuit Court Judge

APPENDIX D

WISCONSIN APPELLATE PROCEDURE

Rule 809.23

PUBLICATION OF OPINIONS

(1) *Criteria for Publication.* (a) Criteria for publication in the official reports of an opinion of the court include whether the opinion:

1. enunciates a new rule of law or a modification of an old rule;

2. applies an established rule of law to a factual situation significantly different from that in published opinions;

3. resolves a conflict between prior decisions of the court; or

4. decides a case of substantial public interest.

(b) An opinion should not be published when:

1. the issues involve no more than the application of well-settled rules of law to a recurring fact situation;

2. the issue asserted is whether the evidence is sufficient to support the judgment, and the briefs show the evidence is sufficient; or

3. the disposition of the appeal is clearly controlled by a prior holding of the court or a higher court, and no reason appears for questioning or qualifying the holding.

(2) *Decision of Publication.* The judge or judges of the Court of Appeals who join in an opinion in an appeal or other proceeding shall make a recommendation on

whether the opinion should be published. A committee composed of the chief judge and one judge from each district of the Court of Appeals selected by the Court of Appeals judges of each district shall determine whether an opinion is to be published.

(3) An unpublished opinion is of no precedential value and for this reason may not be cited in any court of this state as precedent or authority, except to support a claim of res judicata, collateral estoppel, or law of the case.

(4) A person may at any time request the court to have an unreported opinion published in the official reports. A copy of the request shall be served pursuant to Rule 809.80 on the parties to the appeal or other proceeding in which the opinion was filed.

Judicial Council Committee's Note, 1978

As with Rule 809.22 on oral argument, a former practice of the Supreme Court is written into this Rule and formal criteria established for it. The trend toward nonpublication of opinions is nationwide and results from the explosion of appellate court opinions being written and published. Many studies of the problem have concluded that unless the number of opinions published each year is reduced legal research will become inordinately time-consuming and expensive. Some argue that even accepting the premise that a court may properly decide not to publish an opinion this should not prevent that opinion from being cited as precedent since in common law practice any decision of a court is by its nature precedent. Others argue that a court may try to hide what it is doing

in a particular case by preventing the publication of the opinion in the case.

There are several reasons why an unpublished opinion should not be cited: (1) the type of opinion written for the benefit of the parties is different from an opinion written for publication and often should not be published without substantial revision; (2) if unpublished opinions could be cited, services that publish only unpublished opinions would soon develop forcing the treatment of unpublished opinions in the same manner as published opinions thereby defeating the purpose of non-publication; (3) permitting the citation of unpublished opinions gives an advantage to a person who knows about the case over one who does not; (4) an unpublished opinion is not new authority but only a repeated application of a settled rule of law for which there is ample published authority.

If it is desirable to reduce the number of published opinions, the only alternative to having some opinions unpublished is to decide cases without written opinions. This would be far worse because it would compound the problems of nonpublication and at the same time take away from the parties the benefit of a written opinion.

Section 752.41(3) authorizes the Supreme Court to establish by rule the procedure under which the Court of Appeals decides which of its opinions are to be published. Subsection (1) provides for a committee of judges of the Court of Appeals to make this decision.

As a safeguard against any mistakes as to nonpublication, subsection (4) adopts the procedure of the United State Court of Appeals for the Seventh Circuit in permitting a person to request that an unpublished opinion be published.

Judicial Council Committee's Note, 1979

This subsection is amended to delete the prior requirement that a motion had to be filed in order to ask the Court of Appeals to have one of its unreported opinions published in the official reports of the Court of Appeals. Requiring a motion to be filed led to confusion in some instances because the person requesting the opinion to be published may not be a party to the appeal decided by the opinion and uncertainty can occur as to who should be served with a copy of the motion and given an opportunity to respond. The requirement to file a motion has been replaced by the need to simply make a request to the Court of Appeals for publication of an unreported opinion.

APPENDIX E

COSTS ARE PASSED TO CONSUMERS TRYING TO PRUNE THE LIABILITY-AWARD MONEY TREE

By Ernest Conine
Los Angeles Times Columnist

Under the U.S. court system, juries are supposed to be representative of the American people — and probably are. Which means that we have a serious problem of economic illiteracy on our hands.

That's a sweeping indictment, but those who are inclined to challenge its validity should take a look at the sky-high judgments that are being returned these days in personal and product liability suits — frequently in cases where negligence is nebulous, to say the least.

The juries handing out multimillion-dollar awards in liability cases are no doubt acting from generous impulse. They sympathize with the plaintiff, and want to help. So why not stick it to the doctor, corporation or city government allegedly responsible for the injury? After all, they have a lot of money and, in any event, are covered by insurance.

Such thinking reflects an abysmal ignorance of reality. In the final analysis, big liability awards are paid not by the inept surgeon or negligent businessman — or even by his insurance company—but by consumers and taxpayers. That is, by every man, woman and child in the country.

There is nothing wrong with the principle embodied in liability law — or with how the principle was applied until recently.

If a negligent bus driver has an accident that maims a passenger, the injured passenger obviously deserves compensation. When a design or manufacturing flaw causes a fatal auto accident, the manufacturer must be held accountable. The same holds true for a physician who misdiagnoses a serious ailment, a pharmaceutical manufacturer who hides what he knows about a new drug's dangerous side effects, an airline that cuts corners on safety.

It does not follow, however, that a system intended to help victims of negligence should be turned into a money tree for zealous lawyers and not-always-deserving clients without regard for the effect on society as a whole.

The volume of litigation has reached avalanche proportions. In federal courts alone, product-liability suits doubled from 1978 to 1984. And nobody sues for a couple of thousand dollars any more; court judgments average more than $1 million. Awards of $5 million are common, and much higher awards are far from rare.

The courts have broadened the theory of "strict liability" to the point that businesses and their insurers are frequently hit with enormous judgments even in cases where fault has not been proved, where products were made to government specifications — and where the plaintiff's own actions contributed mightily to his injury.

There was the pole vaulter, for example, who received $1.6 million for injuries sustained when he missed the mat. The body-builder who entered a foot race with a refrigerator strapped to his back — and was awarded $1 million for injuries suffered when a strap slipped. The man who

collected $1.7 million on the ground that his heart attack was caused by the excessive force required to start his power lawn mower.

Granted, these are horrible examples. Unfortunately for us all, however, the sock-it-to-them jury mentality that they reflect is all too prevalent.

Liability insurers suffered underwriting losses of $21 billion in 1984, their worst year since 1906. Their response, of course, has been to raise premiums, to make adequate coverage all but unattainable to whole classes of customers and, in some cases, to get out of the liability-insurance business altogether.

The National Association of Manufacturers reports that product-liability premiums among member companies have risen 200 percent to 500 percent.

The effects are being felt not only by those who have been hit by big court judgments. Businesses that have never been sued for a dime find themselves paying exorbitant premiums, which they pass on to their customers, because somebody else in their business was hit by a big suit. Many, unable to get adequate insurance at all, simply stop providing the product or service in question.

There is a baleful effect on the overall economy. U.S. exporters find themselves at a disadvantage in competing with foreign companies that are not encumbered by similarly high insurance burdens. The effect on living costs, while impossible to measure, is obviously great.

The typical company, for example, operates an employee medical-care plan whose costs are being inflated by

successful suits against doctors and hospitals and the resulting increases in malpractice-insurance premiums. The price of every piece of machinery that the company buys includes a rising allowance for the suppliers' liability insurance. The cost of every item delivered by truck is inflated by the truckers' ballooning insurance costs. All these extra costs are passed on to your typical company's customers — all of us.

Aside from the plaintiffs themselves, the only people coming out ahead are the trial lawyers, who collect an average of $7 for themselves to every $6 paid out to claimants.

Efforts are under way in Congress to bring order out of chaos, but nothing sensible is likely to emerge unless the American people get it through their heads that when they read about a $5 million or $10 million liability judgment, the jurors are being generous at their expense.